Supreme Court, U.S.
FILED
MAR 6 - 2015
OFFICE OF THE CLERK

Nos. 14-556, 14-562, 14-571 and 14-574

In The
Supreme Court of the United States

JAMES OBERGEFELL, ET AL., and BRITTANI HENRY, ET AL., *Petitioners*,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., *Respondents*.

VALERIA TANCO, ET AL., *Petitioners*,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., *Respondents*.

APRIL DEBOER, ET AL., *Petitioners*,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., *Respondents*.

GREGORY BOURKE, ET AL., and TIMOTHY LOVE, ET AL., *Petitioners*,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* CONFLICT OF LAWS AND FAMILY LAW PROFESSORS IN SUPPORT OF PETITIONERS

JOANNA L. GROSSMAN
SIDNEY & WALTER SIBEN
DISTINGUISHED PROFESSOR OF FAMILY LAW
Hofstra Law School
121 Hofstra University
Hempstead, NY 11549

ARNOLD & PORTER LLP
SEAN M. SELEGUE
TRENTON H. NORRIS
MARJORY A. GENTRY
Counsel of Record
JOHN S. THROCKMORTON
EMILY H. WOOD
Three Embarcadero Center
10th Floor
San Francisco, CA 94111
Telephone: 415.471.3100
marjory.gentry@aporter.com

Attorneys For Amici Curiae
Conflict of Laws and Family Law Professors

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, *Amici Curiae*, all scholars with expertise in family law, conflict of laws, and state regulation of marriage, respectfully submit this brief in support of Petitioners. *Amici* support all of Petitioners' arguments in their merits briefs and submit this brief to provide the Court with additional information about the states' historical recognition of marriages solemnized in sister states. Appendix A sets forth a list of all the amici on whose behalf this brief is submitted.[1]

SUMMARY OF ARGUMENT

The anti-recognition laws before the Court are historically unprecedented. Even when many states had anti-miscegenation laws, those states almost always recognized interracial marriages validly formalized in sister states. That outcome flowed from the touchstone of marriage recognition law: the "place of celebration" rule, under which a marriage valid where celebrated is valid everywhere. In so ruling—as a matter of state law—courts recognized that out-of-state marriages should be respected as a matter of comity, as well as to avoid the impractical

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[1]Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Further, pursuant to Rule 37.6, no person other than *Amici Curiae* and their counsel have participated in drafting this brief or made a monetary contribution intended to fund the preparation or submission of this brief. In connection with the proceedings before the trial court in *Obergefell v. Hodges*, Professor Joanna Grossman submitted an expert declaration concerning many of the topics discussed within this brief. *Obergefell v. Hodges*, No. 1:13-cv-00501-TSB (S.D. Ohio) at Dkt. No. 44.

and chaotic results that would stem from having a couple's marital status change each time they cross a state border.

The place of celebration rule was nominally subject to oft-recited exceptions that were not only narrow but also, more importantly, rarely applied. These exceptions became nearly vestigial after the demise of anti-miscegenation laws and the general convergence of state rules about which individuals and couples could and could not marry. This trend coincided with social and technological developments that made our nation's population increasingly mobile, which meant more married couples travelled across state lines and moved from state to state. The mobility of the population—sometimes by choice and sometimes not, such as in cases of work reassignments or the need to relocate due to lack of work—made the portability of marriage all the more important.

The respect each state provided to out-of-state marriages provided stability and predictability to families, promoted marital responsibility, facilitated interstate travel, and protected private expectations. It was widely understood that a contrary approach, one that leaned toward denying recognition of valid marriages celebrated in other states, would produce devastating consequences affecting vital interests, such as parentage of children, eligibility for spousal benefits from private employers and public programs like Social Security, property and inheritance rights, medical decisions, and hospital visitation rights in the event of medical emergencies.

All of this changed in the late twentieth century, when the movement to afford same-sex couples marriage equality came to the fore. In reaction to early

indications that at least some states might begin to recognize marriages between individuals of the same-sex, a number of states adopted statutory and constitutional bans on the recognition of marriages by same-sex couples ("the Anti-Recognition Laws"). These widespread Anti-Recognition Laws are historically unprecedented in singling out a class of persons for unequal treatment regarding recognition of their marriages. Even when anti-miscegenation laws existed in some states, few states categorically refused to recognize interracial marriages validly performed in other states.

The categorical restrictions on recognizing same-sex marriages fundamentally altered the terrain of marriage recognition law, which previously turned on individualized determinations by courts. These new statutes shifted decision-making power from courts, where it had largely resided, to the legislature. And, contrary to many historical precedents, the Anti-Recognition Laws draw no distinction between marriages contracted in a particular state to evade restrictions of the couple's home state ("evasive marriages") and those contracted by residents of another state without any evasive intent. Even worse, the constitutional amendments enshrined the rule of non-recognition into state constitutions in an attempt to stem the tide of change and to thwart judicial review by state courts.

Under *Romer v. Evans*, 517 U.S. 620 (1996), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), these blanket prohibitions on the recognition of marriages involving same-sex couples violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In *Windsor*, this Court invalidated the portion of the federal Defense of Marriage

Act ("DOMA"), in which Congress denied federal recognition to marriages by same-sex couples. The Court deemed DOMA's departure from Congress's long history and tradition of deferring to state-law determinations of marital status a discrimination of "unusual character" that warranted "careful consideration" for constitutionality and raised a strong inference of improper animus the Equal Protection Clause forbids. 133 S. Ct. at 2693. Because DOMA's purpose and effect of imposing disadvantage on same-sex married couples served no legitimate purpose, DOMA ran afoul of equal protection principles. *Id.* The Anti-Recognition Laws now before the Court suffer the same flaws. They were adopted for no reason other than to disadvantage same-sex married couples, and the states in question have offered no legitimate reason—nor could any be offered—to explain their deviation from the long tradition of respecting out-of-state marriages.

The Anti-Recognition Laws also run afoul of the Due Process Clause. Marriage, and the right to make personal decisions concerning marriage, has long been recognized as a fundamental liberty interest. *Windsor* reconfirmed this robust constitutional protection. Given the importance of this liberty interest, laws that infringe on an individual's right to remain married are inherently suspect and must be subjected to heightened scrutiny. Here, the Anti-Recognition Laws at issue deprive these same-sex couples of all of the rights and privileges connected with marriage as soon as those couples cross the state borders, rendering them legal strangers. Because there is no legitimate justification for such interference with the liberty interests of married same-sex couples, the Anti-Recognition Laws violate the Due Process Clause as well.

ARGUMENT

I.

BLANKET ANTI-RECOGNITION LAWS ARE HISTORICALLY UNPRECEDENTED.

A. States Have Traditionally Recognized Marriages That Were Valid Where Celebrated.

States have long applied a general rule that a marriage valid where celebrated is valid everywhere. *See, e.g.*, Joseph Story, *Commentaries on the Conflict of Laws* §113, at 187 (8th ed. 1883) ("[t]he general principle certainly is . . . that . . . marriage is to be decided by the law of the place where it is celebrated"); Fletcher W. Battershall, *The Law of Domestic Relations in the State of New York* 7-8 (1910) (describing "the universal practice of civilized nations" that the "permission or prohibition of particular marriages, of right belongs to the country where the marriage is to be celebrated"); William M. Richman et al., *Understanding Conflict Of Laws* §119 at 415 (4th ed. 2013) (noting the "overwhelming tendency" in the United States to recognize the validity of marriages valid where performed); *see also Estate of Loughmiller*, 629 P.2d 156, 158 (Kan. 1981) (same); *Estate of May*, 114 N.E.2d 4, 6 (N.Y. 1953) (same). This rule, known as the "place of celebration" rule or *lex loci celebrationis*, is widely recognized as a central element of American family law.

The general rule was traditionally subject to exceptions for out-of-state marriages that violated the state's "positive law" (*e.g.*, a statute that expressly bars extraterritorial recognition of a particular type of marriage) or "natural law," sometimes described as "public policy." *See, e.g.*, Joseph R. Long, *Law of Domestic Relations* 87-89

(1905) (describing exceptions). The instances and regularity of application of these exceptions has varied between states. Many states have rarely, if ever, applied either exception and, when they did, it was generally in the context of a fact-specific analysis by a court considering a particular request for recognition.

Under that individualized process, state courts frequently upheld marriages from other states that could not have been celebrated in the forum state. *See, e.g.*, *Estate of Loughmiller*, 629 P.2d at 161 (upholding first-cousin marriage because it was not an "odious" form of incest even though the parties married in another state to evade the forum state's prohibition on their marriage). Indeed, this Court on at least one occasion did the same, applying District of Columbia law. *Loughran v. Loughran*, 292 U.S. 216, 222-23 (1934) (recognizing Florida marriage despite D.C. statute prohibiting remarriage by adulterer).

Even in the era of anti-miscegenation statutes, which prohibited and sometimes criminalized interracial marriages in certain states, courts in states with race-based restrictions on marriage almost uniformly recognized interracial marriages validly performed in other states. *See, e.g.*, *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157, 159 (1819) (upholding evasive, interracial marriage from Rhode Island); *State v. Ross*, 76 N.C. 242, 246 (1877) (upholding interracial marriage from South Carolina as a defense to criminal charges in North Carolina of fornication and adultery); *Bonds v. Foster*, 36 Tex. 68, 70 (1871) (validating interracial marriage from Ohio despite Texas statute criminalizing such marriages). In short, while many

courts "cited the public policy exception, many have never actually used it to invalidate a marriage." Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 Tex. L. Rev. 921, 923 (1998).

Only a minority of decisions refused recognition to out-of-state marriages that for one reason or another could not have been formalized in the forum state. *See, e.g., State v. Kennedy*, 76 N.C. 251, 252-53 (1877) (denying recognition but noting that courts in Massachusetts and Kentucky had both refused to apply the exception in similar circumstances); *Toler v. Oakwood Smokeless Coal Corp.*, 4 S.E.2d 364, 366-69 (Va. 1939). But it bears noting that one of those minority decisions led to the landmark decision in which this Court put an end to anti-miscegenation laws. *Loving v. Virginia*, 388 U.S. 1, 2 (1967); *see also* David Margolick, *A Mixed Marriage's 25th Anniversary of Legality*, N.Y. Times, June 12, 1992, at B20.

The liberal approach states generally employed regarding recognition of marriages celebrated in other states, even if those marriages could not have been solemnized in the forum state, reflected important concerns of practicality, fairness and predictability. One nineteenth-century scholar wrote that the general principle that out-of-state marriages would be respected reflected "public policy, common morality, and the comity of nations." James Schouler, *Law of the Domestic Relations* 47 (2d ed. 1874). This Court in 1942 wrote that being married in one state but not another is one of "'the most perplexing and distressing complication[s] in . . . domestic relations.'" *Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (reversing state court order that

refused to recognize out-of-state divorce; quoting *Atherton v. Atherton*, 181 U.S. 155, 162 (1901)).

Modern scholars agree that the general rule "avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state." Richman et al., *supra*, §119, at 415; *see also* Eugene Scoles *et al.*, *Conflict Of Laws* §13.2, at 559 (4th ed. 2004) (a strong policy of marriage is to "sustain its validity once the relationship is assumed to have been freely created"); Andrew Koppelman, *Same Sex, Different States* 17 (2006) ("[i]t would be ridiculous to have people's marital status blink on and off like a strobe light" as they travel or move across state lines). Such problems have only magnified in modern times: "In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere." *Cf. Estate of Lenherr*, 314 A.2d 255, 258 (Pa. 1974) (marriage valid in another state recognized even though forum state law prohibited adulterers from marrying during lives of their former spouses).

In the twentieth century, with the trend toward uniformity in state marriage laws—including the elimination of restrictions on interracial marriage—the "public policy" exception was on the verge of "becoming obsolete." *See* Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 Stan. J. C.R. & C.L. 1, 40 (2005); Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143, 2148 (2005) (public policy exception was becoming "archaic"). Prior to the current controversy, in fact, the

tendency to recognize out-of-state marriages—even evasive ones—was so strong that only in "an exceptional case [should] a court . . . refuse recognition of a valid foreign marriage of one of its domiciliaries even in the face of a local prohibition." Scoles et al., *supra*, §13.9, at 575. But the issue reemerged in the late twentieth century, when controversy over marriage by people of the same sex reinvigorated attempts to invoke the exception.

B. The Four States Within The Sixth Circuit Exemplify Laws Singling Out Same-Sex Marriages For Categorically Unequal Treatment.

1. Kentucky.

Prior to the enactment of House Bill 13 in 1998,[2] which purported to change the rules of marriage recognition in anticipation of marriages by same-sex couples, Kentucky had long followed the "place-of-celebration rule." *Stevenson v. Gray*, 56 Ky. 193, 222-23 (1856) (recognizing Tennessee marriage that was technically incestuous and would have been void if solemnized in Kentucky); *Mangrum v. Mangrum*, 220 S.W.2d 406 (Ky. 1949) (recognizing Mississippi marriage between a thirteen-year-old and a sixteen-year-old even though Kentucky imposed a parental consent requirement for persons of that age); *Robinson v. Commonwealth*, 212 S.W.3d 100, 104 (Ky. 2006) (recognizing Tennessee marriage between a thirty-seven-year-old man and a fourteen-year-old girl); *Tryling v. Tryling*, 53 S.W.2d 725, 727 (Ky. 1932) (recognizing Ohio common-law marriage); *Hoffman v. Hoffman*, 146 S.W.2d 347, 350 (Ky. 1940)

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[2]H.B. No. 13, Ky. Legis. 258 (Ky. 1998), codified as Ky. Rev. Stat. Ann. §402.040 (West 2015).

(same). In other words, Kentucky adhered to the principle that a "marriage, valid where it takes place, is valid everywhere." *Hopkins Cnty. Coal Co. v. Williams*, 292 S.W. 1088, 1089 (Ky. 1927).

Kentucky was not among the minority of states that prohibited so-called "evasive" marriages in which a couple solemnized their marriage in another state to avoid their home state's prohibition of their marriage. *See also* 1 Chester G. Vernier, *American Family Laws* §45 (1931) (unlike some other states, Kentucky never adopted a statute to expressly preclude recognition of evasive marriages); *see* Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 Or. L. Rev. 433, 464-65 (2005).

In 1998, however, Kentucky's generous approach changed when it singled out same-sex couples as unworthy of the state's longstanding deference to marriages performed in other states. Ky. Rev. Stat. Ann. §402.040 (West 2015) (marriages by same-sex couples are "against Kentucky public policy"). To drive the point home, Kentucky enacted another statute prohibiting judicial consideration of out-of-state marriages. Ky. Rev. Stat. Ann. §402.045 (West 2015) ("Any rights granted by virtue of the marriage . . . shall be unenforceable in Kentucky courts"). And, to top it off, in 2004 the Kentucky Constitution was amended to categorically exclude same-sex marriages from recognition. Ky. Const. §233A ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky.").

2. Tennessee.

Prior to the enactment of House Bill 2907 in 1996,[3] Tennessee had long followed the place of celebration rule—that "a marriage valid where celebrated is valid everywhere." *Farnham v. Farnham*, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009) (quoting *Pennegar v. State*, 10 S.W. 305, 306 (Tenn. 1889)). Consistent with the general rule, Tennessee courts routinely acknowledged out-of-state marriages that could not have been formalized in Tennessee. *See Farnham*, 323 S.W.3d at 140 (recognizing Florida marriage that was bigamous because final divorce decree from prior marriage had not yet been issued but was valid under Florida law as "marriage by estoppel"); *Keith v. Pack*, 187 S.W.2d 618, 619 (Tenn. 1945) (recognizing Georgia marriage of a thirteen-year-old even though that was too young to be married in Tennessee); *Shelby County v. Williams*, 510 S.W.2d 73, 74 (Tenn. 1974) (recognizing Mississippi common-law marriage although Tennessee law did not allow for common-law marriage); *Estate of Glover*, 882 S.W.2d 789, 789-90 (Tenn. Ct. App. 1994) (recognizing Alabama common-law marriage); *Lightsey v. Lightsey*, 407 S.W.2d 684, 690 (Tenn. Ct. App. 1966) (recognizing Georgia common-law marriage).

Like Kentucky, Tennessee never adopted a statute to expressly preclude recognition of evasive marriages. *See* Vernier, *supra*, §45; Grossman, *supra*, at 464-65 (discussing marriage evasion laws). In fact, Tennessee courts repeatedly held that

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[3]H.B. No. 2907, Pub. Ch. 1031 (Tenn. 1996), codified as Tenn. Code Ann. §36-3-113 (2015).

evasive, prohibited marriages would be recognized as long as valid where celebrated. *See, e.g.*, *Keith*, 187 S.W.2d at 618-19 (underage marriage valid even though "[n]o reason is apparent why these parties went to Georgia to contract their marriage except that the girl was not qualified under the laws of Tennessee by reason of her age to enter into such a contract"); *Pennegar*, 10 S.W. at 308 (prohibited marriages from other states can be recognized even when the parties married elsewhere "for the purpose of avoiding our own laws in matters of form, ceremony, or qualification").

Tennessee typically denied recognition to out-of-state marriages only when such marriages violated "settled public policy regarding public morals or good order in society," such as those marriages declared criminal. *See, e.g.*, *Rhodes v. McAfee*, 457 S.W.2d 522, 524 (Tenn. 1970) (refusing to give effect to out-of-state marriage between former stepfather and stepdaughter where such marriage constituted a felony in Tennessee and, in any event, had not been validly celebrated in Mississippi in the first instance). But this rule cannot support Tennessee's singling out of same-sex marriages for non-recognition because the state does not and could not criminalize a marriage or sexual relationship between people of the same-sex solely based on the gender or sexual orientation of the parties. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Campbell v. Sundquist*, 926 S.W.2d 250, 262 (Tenn. Ct. App. 1996) ("an adult's right to engage in consensual and noncommercial sexual activities in the privacy of that adult's home is a matter of intimate personal concern which is at the heart of Tennessee's protection of the right to privacy . . ."), *abrogated on other*

grounds by Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827 (Tenn. 2008).

In 1996, Tennessee carved out an exception to its deference to marriages of sister states for marriages by same-sex couples. Tenn. Code Ann. §36-3-113 (2015). It declared that this new exception serves Tennessee's "long-standing public policy . . . to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society." *Id.* Consequently, marriages of same-sex couples were uniquely singled out in Tennessee for categorical non-recognition. And, in an even stronger statement of disapproval, bans on both the celebration and recognition of marriages by same-sex couples were enshrined into the Tennessee Constitution in a 2006 amendment. Tenn. Const. art. XI, §18. This amendment was designed to preclude not only judicial consideration as to the validity of a particular marriage, but also judicial consideration of the validity of the non-recognition rule itself. *Id.* ("Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.").

3. Michigan.

Prior to the enactment of House Bill 5662 in 1996,[4] Michigan had long followed the place of celebration rule. *See Hutchins v. Kimmell*, 31 Mich. 126, 1875 WL 3626, at *3 (1875) ("a marriage valid where it is celebrated, is valid everywhere"); *see also Estate of Miller*, 214 N.W. 428, 429 (Mich. 1927) (recognizing marriage of two first cousins); *Toth v. Toth*, 212 N.W.2d 812, 813 (Mich. Ct. App. 1973) (same); *Noble v. Noble*, 300 N.W. 885, 887 (Mich. 1941) (recognizing Indiana marriage of a seventeen-year-old girl to a nineteen-year-old boy, despite couple's failure to comply with parental consent provisions of Indiana law); *People v. Schmidt*, 579 N.W.2d 431, 434 (Mich. Ct. App. 1998) (recognizing common-law marriage under Alabama law).

Michigan also has never adopted a statute expressly to preclude recognition of evasive marriages. *See* Vernier, *supra*, §45; Grossman, *supra*, at 464-65. In fact, Michigan courts have held repeatedly that evasive marriages can be recognized as long as they were valid where celebrated. *See, e.g., Estate of Miller*, 214 N.W. at 429 (Michigan recognizes a marriage if it was valid where celebrated, even if the parties "have gone abroad for the purpose of evading our laws") (quoting *Commonwealth v. Lane*, 113 Mass. 458, 464 (1873)); *Noble v. Noble*, 300 N.W. at 886 (underage couple had travelled to Indiana "to avoid Michigan law").

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[4]H.B. No. 5662, Public Act No. 334 (Mich. 1996), codified as Mich. Comp. Laws §551.271 (2015).

Before 1996, Michigan typically denied recognition only to out-of-state marriages deemed "contrary to the law of nature," a rule invoked for polygamy or marriages of siblings. *See, e.g.*, *Estate of Miller*, 214 N.W. at 429 (public policy exception to the place of celebration rule applies only where the Legislature "has clearly enacted that such marriages out of the state shall have no validity here"); *but see Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 605 (Mich. 1889) (recognizing bigamous marriage because it was valid under law of Indian tribe).

In 1996, the Michigan Legislature departed from the state's traditional approach of judging the validity of a marriage by the law of the place of celebration by enacting an amendment to its marriage recognition statute that invalidated marriages between members of the same sex no matter where those marriages took place. *See People v. Schmidt*, 579 N.W.2d at 435 (the Legislature enacted a law to "refuse to recognize . . . same-sex marriage"). That amendment created an exception to the longstanding rule of deference to marriages of sister states for marriages by same-sex couples. Mich. Comp. Laws §551.271 (2015).

With this change, marriages by same-sex couples became the only ones expressly singled out by Michigan law for categorical non-recognition. And, like Kentucky and Tennessee, Michigan piled on in 2004 by enshrining the categorical ban into its constitution. Mich. Const. art. I, §25 ("To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.").

4. Ohio.

Prior to the enactment of House Bill 272 in 2004,[5] Ohio had long followed the place of celebration rule. As early as 1891, an Ohio court noted that "[t]he validity of a marriage depends upon the question, whether it was valid where celebrated. If valid there, it is valid everywhere." *Courtright v. Courtright*, 1891 WL 1022, at *2 (Ohio Com. Pl. 1891). This rule has been applied to give effect to marriages that were otherwise prohibited by Ohio law, but valid where celebrated. *See, e.g., Peefer v. State*, 182 N.E. 117, 122 (Ohio Ct. App. 1931) (recognizing an underage marriage solemnized in Kentucky); *Courtright v. Courtright*, 1891 WL 1022, at *3-4 (same); *Howard v. Central Nat'l Bank of Marietta*, 152 N.E. 784, 787-88 (Ohio Ct. App. 1926) (recognizing common-law marriage established in Pennsylvania); *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208-09 (Ohio 1958) (recognizing marriage between first cousins entered into in Massachusetts); *Hardin v. Davis*, 16 Ohio Supp. 19, 1945 WL 5519, at *3 (Ohio Com. Pl. 1945) (recognizing marriage by proxy performed in Mexico).

Ohio has followed its place of celebration rule even when the parties married out-of-state marriage specifically to evade Ohio marriage restrictions. *Courtright*, 1891 WL 1022, at *2 (marriage between Ohio residents valid even though "the parties went out of the state for the purpose of evading the [marriage] laws of this state."); *Hardin v. Davis*, 1945 WL 5519, at *3 ("a marriage so celebrated in conformity

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[5]H.B. No. 272, 2004 Ohio Laws File 61, codified as Ohio Rev. Code Ann. §3101.01(C) (West 2015).

with the local law will be recognized, notwithstanding any evasion of the law pertaining to marriage ceremonies of the state in which the parties are domiciled"). Ohio courts have emphasized that "it is the policy of the law to sustain marriages wherever possible." *Hardin*, 1945 WL 5519, at *6.

While Ohio courts have acknowledged certain exceptions to the place of celebration rule—specifically, for marriages that were incestuous, polygamous, contrary to the laws of nature, or which the legislature has expressly prohibited (*Courtright*, 1891 WL 1022, at *2; *Mazzolini*, 155 N.E.2d at 208-09, Ohio courts have not in fact applied a blanket prohibition against recognizing those prohibited out-of-state marriages. For example, in *Slovenian Mut. Ben. Ass'n v. Knafelj*, 173 N.E. 630, 631-32 (Ohio Ct. App. 1930), the husband had a wife confined to an insane asylum at the time he married his second "wife." Although void under Ohio law, the court recognized the second "wife's" marriage and allowed her to collect on insurance proceeds on the grounds that she was a dependent of the husband and was unaware of his prior wife. *Id.* Similarly, although first cousins are prohibited from marrying in Ohio, Ohio courts have stated that they would recognize such marriages if celebrated in another state where such marriages are allowed. *Id.* at 632.

In what by then was a familiar pattern, Ohio in 2004 created an exception to its longstanding practice of deference to marriages of sister states for marriages by same-sex couples. The Ohio Legislature adopted a provision declaring that

> [a]ny marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex

> shall have no legal force or effect in this state . . . . Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state. (Ohio Rev. Code Ann. §3101.01(C) (West 2015))

With this change, only same-sex marriages were singled out for a rule of categorical non-recognition. And, to make an even stronger statement of disapproval, the ban on recognizing marriages by same-sex couples was enshrined into the Ohio Constitution that same year. Ohio Const. art. XV, §11 ("Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions.").

II.

THE ANTI-RECOGNITION LAWS AT ISSUE DENY EQUAL PROTECTION.

A. The Historically Unprecedented Anti-Recognition Laws Single Out Same-Sex Couples For Disadvantageous Treatment.

The categorical bans preventing any individualized consideration regarding the recognition of out-of-state marriages between individuals of the same sex are historically unprecedented. *See, e.g.*, Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 Tex. L. Rev. 921, 929-30 (1998) (noting that "[b]lanket non-recognition of same-sex marriage . . . would be an extraordinary rule. There is no evidence that any of the legislatures that recently acted gave any thought to how extraordinary it would be"). As already shown,

even interracial marriages were not categorically denied effect in most states that banned such marriages before such bans were ruled unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967). In other words, same-sex married couples are subject to even more discrimination in states that do not permit same-sex marriage than were interracial couples during the heyday of anti-miscegenation statutes.

The new rules of blanket non-recognition fly in the face of the tolerant approach that governed generations of marriages, even during periods of extreme controversy among states about eligibility to marry, such as during the era of anti-miscegenation statutes. Tolerance of disfavored out-of-state marriages, in the name of comity, uniformity, and portability of marital status, was an important and widespread value, which was honored by a strong general rule of marriage recognition. *See* Grossman, *supra*, at 471-72.

More specifically, the Anti-Recognition Laws implemented three key changes to marriage recognition law that are applicable only to same-sex couples: (1) denial of an individualized fact-based analysis of each out-of-state marriage in favor of a categorical ban subject to no exceptions; (2) drawing no distinction between evasive marriages by residents and non-evasive marriages by non-residents who traveled through or moved to the prohibiting state; and (3) barring judicial consideration of each marriage's validity by application of a blanket ban through statute and state constitutional amendment.

While the four states of the Sixth Circuit have rejected those values categorically for marriages

between persons of the same sex, they continue to adhere to the place of celebration rule and its very narrow exceptions for *all other prohibited marriages*. *See, supra*, Section I(B). This two-track approach for marriage recognition—one applicable to opposite-sex couples and another to same-sex couples—violates equal protection. Marriage laws must conform to the mandates of the United States Constitution, including guarantees of equal protection and due process. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia's miscegenation ban for failure to comply with equal protection and due process requirements of federal constitution); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987); *see also Holt v. Shelton*, 341 F. Supp. 821, 822-23 (M.D. Tenn. 1972) ("it now seems settled beyond peradventure that the right to marry is a fundamental one . . . . Any such infringement is constitutionally impermissible unless it is shown to be necessary to promote a compelling state interest.").

Most recently, in *United States v. Windsor*, this Court unequivocally affirmed that state laws regarding marriage are "subject to constitutional guarantees" and "must respect the constitutional rights of persons." 133 S. Ct. 2675, 2691, 2692 (2013). The four states' refusal to recognize marriages by same-sex couples from other states violates those constitutional standards.

In *Windsor*, this Court invalidated Section 3 of the federal Defense of Marriage Act ("DOMA"), which denied federal recognition to marriages by same-sex couples celebrated under state law. The Court held that this categorical non-recognition provision vio-

lated the due process and equal protection guarantees of the Fifth Amendment. 133 S. Ct. at 2696.

DOMA's rejection of "the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State" represented an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage." *Id.* at 2692-93. Except for marriages subject to DOMA, the federal government deferred to state law determinations of marital status when implementing important rights and obligations such as Social Security, taxation, and family and medical leave. By enacting DOMA, however, Congress singled out one type of marriage for non-recognition—regardless of the particular law at issue or any particular federal policy and regardless of the particular couple's need for, or expectation of, recognition. Never before had Congress taken such a drastic measure with respect to marital status. *Windsor*, 133 S. Ct. at 2690.

Indeed, the text, structure, and history of DOMA made clear that its "avowed purpose and practical effect" was "to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Id.* at 2693. Both the law's structure and the legislative history made clear that DOMA was enacted from a bare desire to harm an unpopular minority group, something the United States Constitution forbids. *Id.* (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)). "[N]o legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2696.

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928)). In *Romer*, the Supreme Court invalidated Colorado's Amendment 2, which amended the state Constitution to prohibit any special protections for gays and lesbians. The provision, the majority wrote, is not "directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." 517 U.S. at 635.

Rather than serving a "proper legislative end," Colorado classified homosexuals in order to "make them unequal to everyone else." *Id.* "This," the Court concluded, "Colorado cannot do." *Id.*

In DOMA, the Court saw a similar constitutional defect. Congress's sudden departure from its usual recognition of state marital status laws was, indeed, a discrimination of "an unusual character." *Windsor*, 133 S. Ct. at 2693. The unusual character of the discrimination was "strong evidence of a law having the purpose and effect of disapproval of that class." *Id.*

The categorical state bans on recognition now before the Court suffer a similar constitutional defect. Those bans came about amid a national panic over the possibility that same-sex marriages would be legalized in some states and foisted upon other states through marriage recognition law. But,

just as this Court concluded with respect to DOMA, the "interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the . . . statute. It was its essence." *Windsor*, 133 S. Ct. at 2693. The "avowed purpose and practical effect" of each of the Anti-Recognition Laws is to disadvantage, burden and stigmatize a particular category of people and their families. Its means and end are one in the same, for the "purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

B. Blanket Non-Recognition Laws Cannot Survive Constitutional Scrutiny.

Even if the Anti-Recognition Laws under review were not so obviously rooted in impermissible animus, and unconstitutional for that reason alone, no constitutionally permissible justification exists to justify the blanket non-recognition of marriages by same-sex couples. Although traditional rules of marriage recognition nominally permitted states to refuse recognition to out-of-state marriages that violated their strong public policy (a right rarely exercised, *see* Section I(A), *supra*), the most common reasons for refusal are no longer valid given developments in constitutional jurisprudence. Three types of interests were commonly invoked in defense of a claimed public policy exception to marriage recognition: (1) "a desire to exclude certain sexual couplings or romantic relationships" from the state; (2) "a desire to express the moral disapproval" of the relationship, and (3) "a desire to dissuade couples in the disfavored relationship from migrating to the state in the first place." Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*,

153 U. Pa. L. Rev. 2215, 2216 (2005). None of these reasons survives modern constitutional standards.

Lawrence v. Texas, 539 U.S. 558 (2003), rules out reliance on excluding same-sex relationships as a legitimate state interest. There, the Court identified a liberty interest in private and consensual sexual relationships, regardless of the gender of the parties. Gays and lesbians, like everyone else, have the right to make decisions about intimate relationships without interference from the state. *Lawrence* also explained that moral repugnance is an insufficient basis upon which to infringe an important aspect of the right to privacy. *Id.* at 577-78; *see also Wolff*, *supra*, at 2231; *Singer*, *supra*, at 23-24. And, of course, states may not seek to dissuade interstate travel without running afoul of the right to travel that the federal Constitution assures. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 192-96 (1999) (invalidating California law that forced new residents to wait a year for a higher level of benefits); Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 Rutgers L. Rev. 553 (2000).

The federal Constitution prohibits a state, just as Congress is restrained, from "identify[ing] a subset of state-sanctioned marriages and mak[ing] them unequal" as well as from telling "those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition." *Windsor*, 133 S. Ct. at 2694. Equal protection demands no less.

III.

THE ANTI-RECOGNITION LAWS UNCONSTITUTIONALLY INTERFERE WITH THE FUNDAMENTAL LIBERTY INTEREST IN MARRIAGE.

While this Court has never directly addressed the question of whether there is a fundamental liberty interest that attaches to the status of marriage, the conclusion that such a liberty interest exists follows naturally from this Court's prior decisions upholding the extensive freedoms that attach to decisions regarding marital relationships. "[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right "to marry, establish a home and bring up children" is protected by the Due Process Clause); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684-85 (1977) ("[w]hile the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage . . .") (internal quotation marks omitted); *see also Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring) ("[T]here is a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude.").

The right to make personal decisions with respect to marital relationships is rendered meaningless if states can refuse to recognize disfavored classes of marriages without a constitutionally permissible

basis. While the majority of spouses can be assured that their personal decision to enter into a marital relationship will remain recognized, this is not the case for legally married same-sex spouses in states with Anti-Recognition Laws. Those laws take away the status of being married to same-sex married couples who move or travel to states where those laws are in effect. As a result, legally married spouses find themselves stripped of marital rights and converted into legal strangers simply by crossing state lines. *See* Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 Mich. L. Rev. 1421, 1450-51 (2012).

The consequences are far reaching. Whether a couple is considered married controls a wide range of issues including "housing, taxes, criminal sanctions, copyright." *Windsor*, 133 S. Ct. at 2694-95; *see also* Sanders, *supra*, at 1450 ("property rights are potentially altered, spouses disinherited, children put at risk, and financial, medical, and personal plans and decisions thrown into turmoil"). "[N]ullification of a valid marriage when both partners wish to remain legally married constitutes the most extreme form of state interference imaginable in the marital relationship." Lois A. Weithorn, *Can A Subsequent Change in Law Void a Marriage that Was Valid at its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages*, 60 Hastings L.J. 1063, 1125 (2009).

Here, the laws in each of the states within the Sixth Circuit, as in all states, provide married couples with comprehensive protections and responsibilities. In Kentucky, for instance, those protections include the right to a share of a decedent's estate (Ky. Rev. Stat. Ann. §391.010

(West 2015)); the right to make medical decisions in the absence of an advance medical directive or surrogate decision (*id.* §311.631); the right to adopt children as a couple (*id.* §199.470); and many rights with respect to divorce and custody matters (*see generally* Title XXXV of Kentucky Revised Statutes). The other three states within the Sixth Circuit grant similarly important and substantive rights to married couples but deny those rights to same-sex couples validly married in other states. *See, e.g.*, the right to a share of a decedent's estate (Tenn. Code Ann. §31-2-104 (2015); Mich. Comp. Laws §700.2102 (2015); Ohio Rev. Code Ann. §2105.06 (West 2015)); the right to adopt children as a couple (Tenn. Code Ann. §36-1-115 (2015); Mich. Comp. Laws §710.24 (2015); Ohio Rev. Code Ann. §3107.03 (West 2015)); the right to make medical decisions in the absence of an advance medical directive or surrogate decision (Tenn. Code Ann. §36-1-115 (2015); Ohio Rev. Code Ann. §1337.16 (West 2015)).

Without the protection of a legally recognized marriage, couples of the same sex risk being denied the right to participate fully in society as a couple. *See, e.g.*, Obergefell Pet. Brief at 6-12 (detailing difficulties and impact of Ohio's refusal to recognize Petitioners' marriages); Tanco Pet. Brief at 4-6. The difficulties experienced by the Petitioners with respect to obtaining death certificates, birth certificates, and the recognition of adoptions, as well as their challenges in obtaining health insurance and securing their property rights, are only some of the many hurdles that same-sex couples face as a result of the non-recognition of their marriages. For example, as alluded to in the *Bourke* petitioners' brief, same-sex couples continue to report being denied hospital visitation rights on the grounds that

they do not qualify as "family." *See, e.g.*, Cavan Sieczkowski, *Gay Man Arrested at Missouri Hospital for Refusing to Leave Sick Partner, Not Recognized as Family*, The Huffington Post (Apr. 12, 2013, 2:33 p.m.), http://www.huffingtonpost.com/2013/04/11/gay-man-arrested-missouri-hospital_n_3060488.html (gay man removed from partner's hospital room on grounds he was not "family"). As a result of the non-recognition of these couples' relationships, they have been denied access to each other during such traumatic medical events as miscarriages and the final moments of life. *See, e.g.*, Evan Puschak, *NV Hospital Denies Rights of Domestic Partners*, MSNBC (Oct. 2, 2013, 10:03 p.m.), http://www.msnbc.com/the-last-word/nv-hospital-denies-rights-domestic-pa (lesbian denied access to her domestic partner who was experiencing a miscarriage because she did not have power of attorney); Susan D. James, *Lesbians Sue When Partners Die Alone*, ABC News (May 20, 2009), http://abcnews.go.com/Health/story?id=7633058 (lesbian and children denied access to dying legal spouse because hospital refused to recognize the family). When recognition is denied to legal same-sex marriages solemnized in other states, not only is the status of being married denied, but the very safety, security, and support that attaches to that status is put into jeopardy.

"State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691. Each state that has enacted an Anti-Recognition Law has opted to select a disfavored class of people whose marriages will be nullified within that state. *See, e.g.*, Section I(B), *supra*. Heightened scrutiny must be used in determining whether the State's action in unilaterally voiding a marriage, against the will of either

spouse, comports with the requirements of due process. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (When the government "undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate."); Sanders, *supra*, at 1452-53. When a law imposes a "direct and substantial" burden on an existing marital relationship, the law cannot be upheld "unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996) (citation and internal quotation marks omitted); *see also Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (applying heightened constitutional scrutiny in striking down law barring use of contraceptives by married couples). The Court should therefore apply a heightened standard of review in analyzing whether Anti-Recognition Laws comport with the requirements of Due Process.

In support of Anti-Recognition Laws, numerous state interests have been advanced. These include concerns about reproduction and childrearing, maintaining traditions in the form of a "man-woman" couple, and allowing states more time to assess the possible repercussions of permitting couples who are of the same sex to marry. *See, e.g., DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1039, 1040; 1041 (2015). Each of these justifications for stripping couples of the same sex (and only same-sex couples) of their marriages has been considered and rejected by this Court in connection with its decision in *Windsor*. *See* 133 S. Ct. at 2696. And, to the extent that these Anti-Recognition Laws are justified on the grounds of history, tradition, and moral disapproval, those

rationales cannot survive constitutional scrutiny. *See Windsor*, 133 S. Ct. at 2695; *Lawrence*, 539 U.S. at 571; *Romer*, 517 U.S. at 634-35. Because there is not a constitutionally sufficient justification for the serious harms inflicted by the Anti-Recognition Laws, these laws unconstitutionally deprive married same-sex couples of their liberty interests in their existing marriages. Such an unjustified deprivation of fundamental liberties cannot be tolerated.

CONCLUSION

For the foregoing reasons, this Court should hold that the state non-recognition laws before it violate equal protection and due process. Same-sex couples should not be summarily stripped of a marriage, "the most important relation in life" (*Maynard v. Hill*, 125 U.S. 190, 205 (1888)), simply by crossing state lines.

Respectfully,

JOANNA L. GROSSMAN
SIDNEY & WALTER SIBEN
DISTINGUISHED PROFESSOR
OF FAMILY LAW
Hofstra Law School
121 Hofstra University
Hempstead, NY 11549

ARNOLD & PORTER LLP
SEAN M. SELEGUE
TRENTON H. NORRIS
MARJORY A. GENTRY
Counsel of Record
JOHN S. THROCKMORTON
EMILY H. WOOD
Three Embarcadero Center
10th Floor
San Francisco, CA 94111
Telephone: 415.471.3100
marjory.gentry@aporter.com

Attorneys For Amici Curiae
Conflict of Laws and Family Law Professors

March 6, 2015.

APPENDIX

APPENDIX A

Amici Curiae are scholars with a wide range of expertise relating to family law, conflict of laws, and state regulation of marriage. Their expertise thus bears directly on the issues before the Court in this case. These Amici are listed below. Their institutional affiliations are listed for identification purposes only.

Susan Frelich Appleton
Vice Dean and
Lemma Barkeloo & Phoebe Couzins Professor of Law
Washington University School of Law

Katharine T. Bartlett
A. Kenneth Pye Professor of Law
Duke University Law School

Sara R. Benson
Lecturer in Law
University of Illinois College of Law

Brian H. Bix
Frederick W. Thomas Professor of
Law and Philosophy
University of Minnesota

June Carbone
Robina Chair of Law, Science and Technology
University of Minnesota Law School

J. Herbie DiFonzo
Professor of Law
Maurice A. Deane School of Law at
Hofstra University

Maxine Eichner
Reef C. Ivey II Professor of Law
UNC-Chapel Hill School of Law

Ann Laquer Estin
Aliber Family Chair
University of Iowa College of Law

Lawrence M. Friedman
Marion Rice Kirkwood Professor of Law
Stanford Law School

Jennifer S. Hendricks
Associate Professor
University of Colorado Law School

Suzanne A. Kim
Associate Dean and Professor of Law
Rutgers University, School of Law-Newark

Kevin Noble Maillard
Professor of Law
Syracuse University College of Law

Barbara Stark
Professor of Law
Hofstra Law School

Bela August Walker
Associate Professor of Law
Roger Williams University School of Law

Rhonda Wasserman
Professor of Law
Buchanan, Ingersoll & Rooney Faculty Scholar
University of Pittsburgh School of Law

Verna Williams
Judge Joseph P. Kinneary Professor of Law
University of Cincinnati College of Law

Jennifer Wriggins
Sumner T. Bernstein Professor of Law
University of Maine School of Law

Marcia Yablon-Zug
Associate Professor of Law
University of South Carolina School of Law